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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6851

NEVILLE M. TUCKER,
Petitioner,

vs.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE
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NEVILLE M. TUCKER,
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v.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner, Neville M. Tucker, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered in the above entitled case on May 9, 1975; petition for rehearing denied June 27, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky has not been reported and is printed in the Appendix at 1a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on May 9, 1975, Appendix 1a. The petition for rehearing was denied on June 27, 1975, and on the same day there was issued the mandate, Appendix 4a, in which petitioner was permanently disbarred from the practice of law in the Commonwealth of Kentucky.

On motion of the petitioner, a stay of execution and enforcement of the mandate of the Court of Appeals was granted on June 30, 1973, for a period of ninety days from June 27, 1975. Under date of September 25, 1975, this Court, per Mr. Justice Stewart, continued the foregoing stay, pending the filing of a timely petition for a writ of certiorari, and this Court's action on such petition, and, if granted, pending the issuance of this Court's mandate.

By order of this Court dated September 19, 1975, per Mr. Justice Stewart, the time for the filing of the petition for a writ of certiorari was extended to and including November 10, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED FOR REVIEW

This is one of three cases coming before this Court in this term from Kentucky which present serious questions as to the Constitutionality of procedures employed by the Court of Appeals of Kentucky in respect to the disciplining of

attorneys. 1/

Though the precise issues presented by each of the cases are somewhat different, the pervasive feature which is reflected in all of them is that the design of disciplinary proceedings in Kentucky denies the fundamentals of due process.

The specific due process questions presented for review in this proceeding are the following:

1. Whether an attorney, having been charged by a bar association with conduct which it claims merits a reprimand and having been given notice that a proceeding is being brought in the highest court of the State to affirm that reprimand, may, consistent with the due process clause of the 14th Amendment, and without further notice, warning or an opportunity to be heard, be subjected to an escalation of the entire matter to the point of disbarment?

2. Whether, under the facts and circumstances of this case, the Commonwealth of Kentucky deprived petitioner of procedural due process by disbarring him without giving him fair notice that such a severe sanction was contemplated, and indeed by lulling him "into a false sense of security" by the lack of fair notice so that petitioner had "no reason even to suspect" that he might be disbarred? In re Ruffalo, 390 U.S. 544, 550-52 (1968).

1/ The other cases are: Getty v. Commonwealth of Kentucky ex rel. Kentucky Bar Association, No. 75-125, and Collis v. Kentucky Bar Association, No. 75-471.

3. Whether procedures for disbarment of attorneys in Kentucky may be sustained under the 14th Amendment where the Board of Governors, the decision-making body in the first instance, with full power to terminate the matter, considers and determines its actions in camera and without accepting briefs or arguments from the attorney, and where the Court of Appeals, which makes the ultimate decision, does not permit oral argument before it on any question?

4. Whether an attorney may be permanently disbarred from the practice of law under disciplinary procedures which state that it is "sufficient that facts be proved by a preponderance of the evidence" and where the disbarring court has acted on inferences not sustained by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, §1:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rules of the Court of Appeals of Kentucky (RCA), 7 Baldwin's Kentucky Revised Statutes (1969):

"RCA 3.160. (a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits. ***"

"RCA 3.370. Upon receipt of the report of the Trial Committee the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case...

"The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings... If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of the proceedings shall be filed with the Clerk. Any recommendation to the court that disciplinary action shall be taken shall be advisory."

"RCA 3.410. Promptly upon the filing of the order as provided in RCA 3.370, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days... to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor."

"RCA 3.380. Upon finding by the Board of guilt or unprofessional conduct, discipline may

be administered by the Board without further proceedings or right of appeal to the Court; or by the Court ... upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. ***"

STATEMENT OF THE CASE

This case concerns the disbarment from the practice of law of petitioner, a 42-year-old Black attorney who in his 18-year legal career has participated in numerous unpopular civil rights cases. For four years of his career he sat as Police Court Judge in the City of Louisville, an elected position which made him at the time the highest elected Black official in the Commonwealth. Before that, he had been a member of the Louisville Board of Education. He has taken a firm position on the issue of integration in Louisville and in fact was a witness for the plaintiffs in the recent federal court proceeding on integration of the schools. His entire career has reflected a concern for the Constitutional and legal rights of the Black people of Kentucky.

The background facts of this case are relatively simple. Petitioner represented one Gloria Jean Brown of New Jersey in a personal injury claim. The claim was settled on October 2, 1972, and petitioner sent his client a check for $42,000 with a complete accounting as to counsel fees and expenses. No issue was ever raised by Ms. Brown as to the accuracy of that accounting. The letter included a statement that $666.96 was being retained by petitioner "until I can make the proper adjustment for the last plane ticket and hotel bill which I neglected to include in the settlement as a

deduction... You shall hear from me again in a few days, at which time I shall make the proper adjustments and forward the balance to you." Petitioner delayed resolving this relatively minor item and a check that he sent for $550 on August 14, 1973 in settlement of this item was returned for insufficient funds, as was a replacement check for $570 dated April 25, 1974.

Under date of July 22, 1974, petitioner received an informal notice from the Kentucky Bar Assocation that a complaint was being filed against him by Ms. Brown. Within a week, petitioner sent her a certified check in the amount of $570, paying in full all the moneys due her, including all bank charges incurred by her as a result of petitioner's checks having been returned for insufficient funds.

On September 13, 1974--almost three months after the matter had all been cleared up--petitioner was served with a formal complaint (Appendix 5a) by the Inquiry Tribunal of the Kentucky Bar Association, setting up three counts. No action was ever taken with respect to Count III, and the opinion of the Court of Appeals of Kentucky (Appendix 1a) makes it clear that it was not acting on Count I. Thus, at issue is only Count II, which charged solely the drawing of two checks (both for the same obligation) payable to Gloria Brown which were returned because of insufficient funds. Confident that he faced no serious problem before the Inquiry Tribunal, since the matter had been cleared up, petitioner elected to file no response to the complaint.

Under the Rules of the Court of Appeals of

Kentucky (hereafter "RCA"), the procedure with respect to disciplining of attorneys is as follows:

1. Charges are filed with the Director of the Kentucky Bar Association, who refers the matter to an Inquiry Tribunal (RCA 3.160).

2. If there are issues of fact, the inquiry Tribunal appoints a trial committee. But if the respondent elects not to file an answer, then the Inquiry Tribunal submits the file to the Board of Governors without findings or recommendations (RCA 3.210). 2/

3. Action of the Board of Governors is effected by a majority vote of the Board's 17 members. There are no proceedings in which the parties are heard before the Board; no briefs are filed before it; and indeed neither the complainant nor the respondent is permitted to appear before it. The Rules expressly provide that no person other than a member of the Board may even "be present" (RCA 3.370) during consideration of a disciplinary case, and no letters or communications may be sent to the Board (RCA 3.290). In short, it is a secret and in camera proceeding.

4. The Board is empowered by the Rules to

2/ If the attorney elects to file an answer and raise issues of fact, there are procedures for the appointment of a Trial Committee and the hearing of evidence. That was not done in this case.

determine by roll call vote "whether the respondent is guilty or not guilty," and, if guilty, "the disciplinary action to be recommended."

Under the Rules of the Kentucky Court of Appeals, a) if the respondent is found not guilty, the Board's action is final (RCA 3.370); b) if the respondent is found guilty and the Board recommends a "private reprimand," the matter is closed "without further proceedings or right to appeal to the Court" (RCA 3.380); c) if the finding is guilty, the matter goes to the Court upon "recommendation by the Board" (RCA 3.380). In petitioner's case the Board of Governors found him guilty of Counts I and II and recommended that he be given a public reprimand.

The first formal notice that petitioner received after the matter had been placed before the Board of Governors was after they had acted and he received a show cause "Rule" issued by the Clerk of the Court of Appeals of Kentucky under date of November 26, 1974, calling his attention to the fact that the Bar Association had recommended a public reprimand of him and directing him to respond (Appendix 4a). Petitioner had filed with the Board a response to the charges, but there is no evidence that his response was considered.

In his brief filed in response to the foregoing Rule, the petitioner did not contest the fact that checks had been returned for insufficient funds but he did point out (and the Court of Appeals appears to have accepted his view [Appendix 2a]) that there had not been a majority of the Board of Governors sustaining Count I, a charge of failing

to pay money to his client. In fact he had made the payment. Petitioner's presentation before the Court was that his conduct did not merit public reprimand, as recommended by the Board of Governors, but that at most a private reprimand would have been sufficient disciplinary action.

Though the only issue before the Court of Appeals was the recommendation by the Board of Governors that a public reprimand be made, with petitioner claiming that a private reprimand was sufficient, the Court of Appeals, on its own initiative and without warning or permitting argument, under date of May 9, 1975, handed down its opinion that petitioner be permanently disbarred from the practice of law in the Commonwealth. Petitioner thereupon filed a petition for rehearing and a motion for oral argument, both of which were denied without opinion (Appendix 4a). In the petition for rehearing, the first time petitioner could respond to the charge that his conduct merited disbarment, petitioner raised Federal Constitutional challenges to the procedures leading to the Kentucky Court's order. An amicus brief filed by a group of Kentucky lawyers and raising some of these Constitutional issues was also filed.

Since the Court of Appeals denied the petition for rehearing without an opinion, no reference to the Constitutional issues was made by that Court, but it must necessarily have considered and rejected those claims. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

REASONS FOR GRANTING THE WRIT

I.

THE CASE PRESENTS AN IMPORTANT ISSUE AS TO THE REQUIREMENTS OF FAIR NOTICE AS TO THE REACH OF THE GRIEVANCE PROCEDURE IN BAR DISCIPLINARY PROCEEDINGS, PARTICULARLY AS REGARDS FAIR NOTICE OF THE TYPE OF DISCIPLINE TO WHICH THE ATTORNEY MIGHT BE SUBJECT.

In re Ruffalo, 390 U.S. 544, 550-51 (1968), establishes that disciplinary proceedings of an attorney are "adversary proceedings of a quasi-criminal nature," and that the basic requirements of procedural due process apply, particularly fair notice as to the reach of the grievance procedure, the precise nature of the charges, and an opportunity to be heard. 3/

In the case at bar, the Court of Appeals of Kentucky, which interpreted Kentucky law in this case to give it complete and unrestricted power to determine the facts, the law, and the final action to be taken in all bar disciplinary proceedings (Appendix 2a), issued process to petitioner by way of a Rule reciting that the charging party, the Kentucky Bar Association, through its Board of Governors, had recommended a public

3/ The precise holding of Ruffalo was that "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552 (emphasis supplied).

reprimand of him, and directing him to show cause "why he should not be disciplined" (Appendix 4a). This was the notice served upon the petitioner, and it made clear that the only issue before the Court of Appeals was whether or not petitioner should be disciplined by way of public reprimand as recommended by the charging party.

The effect of this notice, in view of what ultimately transpired, was, in the language of Ruffalo, to lull petitioner "into a false sense of security," 390 U.S. at 551, n. 4, for the simple reason that petitioner had "no reason even to suspect," ibid., that the Court of Appeals was considering his disbarment--which, as far as concerns a lawyer's career, is capital punishment. 4/

4/ Compare the language of the order to show cause issued in Ruffalo, 390 U.S. at 545, wherein it was made absolutely clear in the order that the relief sought was disbarment of the attorney. And compare the unusual lengths to which this Court went in Selling v. Radford, 243 U.S. 46 (1917), where, after issuing a rule to show cause why an attorney should not be disbarred from this Court, and after receiving the attorney's answer, it considered the matter so important that the Court wrote what can only be described as an advisory opinion defining exactly what it considered to be open to its consideration and then, in order "not to foreclose the subject on the answer made to the rule to show cause," gave the respondent, sua sponte, additional time within which to file additional papers addressing themselves with specificity to the matters delineated in its opinion. Thereafter, it should be noted, the proceeding against the attorney was stricken from the docket. 244 U.S. 664 (1917).

The only issues in this case were whether the admitted conduct constituted unprofessional conduct and, if so, the appropriate punishment. Having been "lulled" into a belief that no more than a reprimand was involved, petitioner raised no issue except as to the nature of the reprimand.

His position before the Court in Kentucky would have been wholly different had he been notified that disbarment was sought and it is clear that the requirement of fair notice extends not only to the content of the charges but as well to the "reach of the grievance procedure." Ruffalo, supra.

Morgan v. United States, 304 U.S. 1 (1937), involved administrative proceedings before the Secretary of Agriculture of a "quasi-judicial" character. Even in this loose context, the Court, per Mr. Chief Justice Hughes, held it was "one of those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (at 19) that "[t]hose who are brought into contest with the Government in a ... proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command" (at 18).

If the Board of Governors or the Court of Appeals proposed disbarment, then petitioner had a right, consistent with due process, to be so advised, and to be heard. If litigants in a proceeding which is only quasi-judicial must be so advised, then certainly an attorney in a proceeding before the highest court of a State, where the proceeding is not only judicial, but quasi-criminal, must be likewise advised.

Nor can it be seriously contended that petitioner had received notice of a possible disbarment. The rule directed him to show cause "why he should not be disciplined pursuant to the provisions of RCA 3.380." That provision states that "discipline may be administered ... by the Court ... upon recommendation by the Board, by way of public reprimand, censure, suspension ... or disbarment." While RCA 3.380 may be ambiguous when read alone, the show cause rule, by referring to the recommendation of public reprimand in addition to RCA 3.380, certainly led (or misled) petitioner to believe that the only issue before the Court was the propriety of a public reprimand. This was especially the case because the language of the show cause rule differed from the language specified for such a rule by RCA 3.410, which says that the attorney shall be ordered to "show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor." 5/

Especially in view of the difference in language, petitioner had a right to assume that the only issue before the Court was whether or not he should receive a public reprimand.

While the Court of Appeals relied on Kentucky State Bar Association v. Stivers, Ky., 475 S.W.

5/ Compare the notice given to petitioner in the Collis case, supra, where the rule was in the exact language of RCA 3.410, and where the Board of Governors had recommended disbarment. See petition for certiorari in No. 75-471, presently pending before this Court, at p. 7 thereof.

2d 900 (1972), for its holding in the instant case that it was not limited in any way by the Board's recommendation, certainly petitioner here could not have relied on the Stivers opinion to put him on notice that the Court might disbar him because in that case the Board of Governors recommended that Stivers be suspended for three years, 475 S.W. 2d at 902, and the show cause rule so stated ("This proceeding comes before us on a rule to show cause why the respondent should not be suspended from the practice of law for a period of three years..." 475 S.W. 2d at 901). The opinion of the Court speaks essentially to its fact-finding power, and nowhere does the Court even intimate that it could or would impose a more severe penalty than that recommended without some further notice to the attorney. In fact, Stivers was given a one-year suspension, 475 S.W. 2d at 904-5. Certainly, the bald statements in Stivers with regard to the broad power of the Court cannot be construed to repair the Constitutionally inadequate notice in this case

Whatever may be the power of the Court of Appeals under Kentucky law, a question not here at issue, the Constitutional adequacy of the notice must be judged by what notice was in fact given, i.e., by the rule to show cause. Petitioner was Constitutionally entitled to be advised of what discipline the Court of Appeals might inflict upon him, and to be heard thereon. Cf., Morgan v. United States, supra.

As pointed out heretofore, in other disbarment cases the order to show cause is always explicit as to the penalty sought to be imposed. See, e.g., Ruffalo, at 545; Stivers, at 901; Selling v. Radford; all supra. If the rule here was ambiguous, it did

not give Constitutionally adequate notice, due to the seriousness of the matter at issue, and the capital punishment which was imposed. Cf., Ruffalo, supra; Selling v. Radford, supra. The effect of ~~an ambiguous~~ 19/3 show cause rule, as is starkly evidenced in this case by the fact that petitioner's brief before the Court of Appeals argued not that he should not be disbarred, but merely that he should not be publicly reprimanded as recommended by the Board of Governors, is to do exactly what was held to be Constitutionally impermissible in Ruffalo, i.e., to lull the attorney "into a false sense of security" by giving him "no reason even to suspect" that he might be disbarred. See 390 U.S. at 551, n. 4. Indeed, it is hardly possible to imagine any attorney faced with disbarment not arguing to the point unless, as happened here, the attorney had "no reason even to suspect" that he might be disbarred.

II.

THE CASE PRESENTS AN IMPORTANT ISSUE AS TO THE SCOPE OF THE RIGHT TO BE HEARD IN BAR DISCIPLINARY PROCEEDINGS BEFORE INTERMEDIATE BODIES WHICH HAVE THE POWER TO ACQUIT OR OTHERWISE TERMINATE THE MATTER AND THE COURT WHICH HAS THE ULTIMATE POWER TO CONVICT AND DISBAR.

The procedures for discipline of lawyers in Kentucky are extraordinary in the extent to which they deny due process. RCA 3.370 empowers the Board of Governors--the intermediate advisory

body--to render a "not guilty" verdict on the charges brought against the attorney. In the event the Board so finds, RCA 3.370 provides that "the Board's action is final." 6/ Furthermore, even if the Board should convict, the Kentucky Rules provide it with the further power to entirely terminate the matter merely by recommending a private reprimand. RCA 3.380.

The difficulty arises from the fact that RCA 3.370 also operates to deny an accused attorney, like the petitioner, all opportunity to appear befor the Board or to submit any brief or argument urging that such a final acquittal determination, or a mere private reprimand, be made.

In Southern Railway Co. v. Virginia, 290 U.S. 190, 197-9 (1933), this Court held that where a State highway commissioner was statutorily "empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property," the "inhibitions" of the 14th Amendment outlawed such a final unfavorable decision; the affected party was held "entitled to a fair hearing upon the fundamental facts." Is not a party similarly entitled to a "fair hearing" before an intermediate State agency empowered by court rule to render a final determination favorable to the accused individual?

6/ In Kentucky State Bar Association v. Stivers, Ky., 475 S.W. 2d 900, 904 (1971), the Court of Appeals observed: "So far as we are concerned the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted."

If part of the duties of the Board of Governors is to determine if the accused attorney is not guilty or merely entitled to a private reprimand, "that duty cannot be performed by one who has not considered evidence or argument," for "the one who decides must hear." Morgan v. United States, supra, 298 U.S. at 481; emphasis added. Due process thus requires that an affected party be given the opportunity at least to present written or oral argument before a body possessing powers of final adjudication in certain areas. In the circumstances of a quasi-criminal disciplinary proceeding, where the accused attorney can be "condemned to suffer grievous loss" (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 [1951]), it becomes appropriate for this Court to delineate the necessity and scope of the argumentative-type hearing that might be appropriate before the Board of Governors. As the Kentucky procedures now stand, the Board acts in camera without giving the attorney even the semblance of procedural due process.

Nor is the situation different for the petitioner because he failed to file a response before the Trial Committee. Only the Board could make a final determination, which in this case revolved about whether, upon all the circumstances, the transmission of checks which were returned for insufficient funds constituted unprofessional conduct and, if so, what the punishment, if any, should be. On these critical questions there was no way of communicating with, let alone being heard by, the Board--which at least had the power either to acquit or order a private reprimand which would end the matter.

The lack of due process at the level of the Board is not mitigated, but rather is exacerbated, by the position of the Court of Appeals of Kentucky as to the Court's fact-finding power. In Kentucky State Bar Association v. Stivers, supra, 475 S.W. 2d at 903-904, the Court of Appeals said:

> "The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." 7/

The Court of Appeals has thus abjured any role as an appellate or reviewing court in disciplinary cases; it has declined to give any weight to the findings of the Board of Governors or to determine if those findings are supported by substantial evidence. Instead, the Court of Appeals has openly adopted "the role of fact-finder." The members of the Court of Appeals can thus make their own findings of fact, as they did in this case by inferring that the petitioner "converted those funds to his own use."

True, the demands of due process do not require an evidentiary hearing "at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

7/ This Court denied certiorari in the Stivers case, 406 U.S. 968 (1972). But the petition in that case did not raise the Constitutional questions here raised.

Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-3 (1941). But that assumes that at some point there is an evidentiary hearing which is given some weight.

Since there were in this case no factual issues as to whether or not the checks had been issued, there was no trial before a Trial Committee. Where, then, could petitioner be heard and present evidence on the question whether his conduct amounted to professional misconduct and, if so, what punishment was appropriate? Not before the Board; that is an in camera proceeding.

Then what type of hearing did he have before the Kentucky Court? Though it claimed the power of fact-finding, it had no record from which it could consider the issues, nor any procedure for the taking of testimony. And when petitioner discovered that disbarment was being sought, he requested oral argument but that was denied. This was peculiarly the kind of case where oral argument was required and for precisely the reasons set forth in Herring v. New York, ____ U.S. ____, 45 L. Ed.2d 593 (1975). And it should be noted that in Herring the Court was addressing the right of oral argument before a court, not a jury, and of argument as to the conclusions to be drawn from the facts.

The combination of lack of a record, the insistence by the Court of Appeals that it alone is the fact-finder, the lack of a mechanism for taking evidence, and the denial of oral argument add up to a total lack of due process at the level of the Court of Appeals of Kentucky.

III.

THE CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION ON THE STANDARD OF PROOF REQUIRED IN BAR DISCIPLINARY PROCEEDINGS RESULTING IN DISBARMENT.

RCA 3.330 expressly provides "the burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence."

While it is true that there was no issue in this case as to whether the checks were issued, the Court of Appeals nevertheless, in order to sustain the extreme penalty of disbarment, drew certain factual inferences. It said in its opinion (Appendix 3a), "Simply stated, respondent had converted those funds to his own use."

There was absolutely no proof of conversion. In fact, the Board of Governors had not by a majority vote found a failure to pay funds due to the client. Thus, the Court of Appeals' inference of conversion was unsustained by the record. There are any number of inferences other than conversion that may be drawn from the return of a check for insufficient funds.

No such inference could have been drawn by the Court of Appeals had it been required to pursue a standard of proof other than the most limited one defined by its Rules. The adoption by the Court of Appeals of the minimum standard of proof--preponderance of the evidence, as is employed in civil cases--is inappropriate to a bar

disciplinary proceeding which is "quasi-criminal in nature," In re Ruffalo, supra. And see, In re Winship, 397 U.S. 358 (1970), holding that in a juvenile delinquency proceeding, even though not a "criminal prosecution," 397 U.S. at 359, n. 1, the required standard was proof beyond a reasonable doubt. The Court there specifically struck down a standard of preponderance of the evidence.

Certainly the standard of proof here should at least be that the proof be by "unequivocal and convincing evidence," which this Court has required in other proceedings which, though non-criminal, have grave impact upon the lives of human beings, Woodby v. Immigration & Naturalization Service, 385 U.S. 276, 285 (1966).

The facts of this case demonstrate how the standard of proof was critical at the stage of consideration before the matter came to the Court. The Board of Governors by a vote of nine to three found the petitioner guilty of unprofessional conduct, nine votes being the minimum required under the Rules for returning a finding of guilt. Is it not entirely likely that if the Board of Governors had utilized a standard more stringent than "by a preponderance of the evidence," it would have changed the vote of at least one of the members of the Board who voted for guilt? Cf., In re Winship, supra, 397 U.S. at 360. Under the Rules of the Court of Appeals, the proceedings would then have ended by a failure of the Board to find by a majority vote that unprofessional conduct had occurred.

Thus it is clear that at both the administrative

and the judicial levels the standard of proof had decisive impact on this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated:
November 10, 1975.

Respectfully submitted,

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APPENDIX
Opinion

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION
Complainant

v.

NEVILLE M. TUCKER
Respondent

PER CURIAM

This is a disciplinary proceeding in which the Board of Governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct and recommended that he be publicly reprimanded and ordered to pay the costs of the action.

A charge was filed against the respondent after he failed to file a response to the complaints certified to him. After the charge was filed, respondent failed to file a timely answer as required by RCA 3.160. The inquiry tribunal entered an order submitting the record to the Board of Governors for disposition. More than a month after submission, the respondent attempted to file a late answer to the charge.

The respondent settled a personal injury claim for a New Jersey client. After payment of expenses and attorney fee, there remained a balance of $42,666.96. Respondent forwarded a check to his client in the sum of $42,000, stating that $666.96 was being retained "until I can make the proper adjustment for the last plane ticket and a hotel bill which I neglected to include in the settlement as a deduction ***. You shall hear from me

again in a few days at which time I shall make the proper adjustment and forward the balance to you." About nine months later and after nine written demands by his client's New Jersey lawyer, respondent forwarded a check to his client for $550. This check was returned to the client twice marked "insufficient funds." After another eight months elapsed and four additional written demands for payment, respondent forwarded another check to his client in the sum of $570. This check also was returned because of "insufficient funds." Four months later after respondent's client filed a complaint with the Kentucky Bar Association, respondent sent a certified check to his client in the sum of $570.

Count I of the charge has as its basis the withholding of the client's money. Count II of the charge is based on the respondent's checks being returned for "insufficient funds."

Respondent's answer recites that the delay in remitting funds was caused by the exchange of an airline ticket by the client and members of her family. Further that a certified check in the sum of $570 was submitted which represented the amount due the client plus the charges incurred by the return of the other checks.

Respondent argues that the vote of guilty on Count I by the Board of Governors does not represent a majority vote. We are not disposed to unravel this question for the reason that we direct this opinion to the matters contained in Count II of the charge.

The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. Kentucky State Bar Association v. Stivers, Ky., 475 S.W. 2d 900 (1972).

We are of the opinion that the facts set out in Count II, and admitted by respondent, constitute such dishonesty by the respondent as to warrant permanent disbarment from the practice of law. The fact that these checks were returned for "insufficient funds" can only have one meaning, that is the client's funds were no longer intact. Simply stated, respondent had converted these funds to his own use. We see little difference in the facts here and those in In re Waxman, 290 Ky. 277, 160 S.W. 2d 587 (1942), which resulted in the permanent disbarment of an attorney. The fact that restitution was made does not alter the initial dishonesty in misappropriating his client's funds. With respect to a client's funds in the hands of an attorney, he is the trustee of an express trust, and converting these funds to his own use is such reprehensible conduct as to make him unworthy of public confidence and unfit to discharge in a proper manner his obligations as an officer of the court.

Honesty, high ethical standards and good moral character are necessary qualifications for admission to the bar, and their existence is essential to the continuance of such membership. Therefore, when an attorney ceases to possess these traits of character in whatever mode or manner the want of them is exhibited, he may be removed.

Cf. Kentucky Bar Association v. Collis, Ky., ___ S.W. 2d ___ (rendered May 9, 1975).

Accordingly, it is ordered that the respondent be and he is hereby permanently disbarred from the practice of law in this Commonwealth, and he is required to pay the costs of this proceeding.

All concur.

Rendered: May 9, 1975.

Order Denying Motion for Oral Argument

The motion of the respondent, Neville M. Tucker, for the granting of an oral argument in this proceeding is hereby denied.

Full court sitting. All concur.

ENTERED this 27th day of June 1975.

Scott Reed
Chief Justice

Mandate and Order Denying
Petition for Rehearing

It is therefore ordered that the respondent, Neville M. Tucker, is hereby permanently disbarred from the practice of law in the Commonwealth of Kentucky, that he fully comply with the provision of RCA 3.390 and that the respondent is ordered to pay the costs of this action including the cost certified by the Kentucky Bar Association.

Frances Jones Mills
C.C.A.

Issued June 27, 1975.

RESPONDENT'S PETITION FOR REHEARING DENIED 6-27-75.

Rule
on Finding and Recommendation of the
Board of Governors of the Kentucky Bar Assn.

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Jefferson County, GREETINGS:

The Vice President of the Kentucky Bar Association having filed an order pursuant to RCA

3.370 recommending a public reprimand of Respondent in the matter of KENTUCKY BAR ASSOCIATION, Complainant Versus NEVILLE M. TUCKER, Respondent, you are hereby commanded to summons Respondent to file due response within 20 days after the service of this summons, and show cause, if any he has or can, why he should not be disciplined pursuant to the provisions of RCA 3.380, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof.

Issued at Frankfort, Kentucky, this the 26th day of November, 1974.

Frances Jones Mills
Clerk, Kentucky Court
of Appeals

Charge

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Neville M. Tucker, whose last known address is 235 South Fifth Street, Louisville, Kentucky 40202, a member of said association, did engage in the following unprofessional and unethical conduct:

I.

Gloria Jean Brown, 174 No. Grove Street, East Orange, New Jersey, was represented by Respondent Neville M. Tucker in a personal injury case wherein the settlement due to said Brown was $42,666.96. Respondent then sent, by letter dated October 2, 1972, a check to Brown for $42,000. Respondent told Brown he retained $666.96 of Brown's settlement in order to make

certain adjustments for travel expenses. Brown made repeated demand to Respondent requesting the remainder of her settlement on October 31, November 28 of 1972, January 15, April 9, August 14 of 1973, and March 5, March 26, April 9, June 13 of 1974. Respondent has delayed and/or failed to timely pay Brown the monies due her.

II.

On or about August 14, 1973, within the same facts and circumstances described in Count I above, the said Brown received from Respondent a check for approximately $550 due to Brown as the remainder of the said personal injury settlement. Brown deposited Respondent's check twice but both times it was returned because of insufficient funds. In April of 1974, Respondent issued check #130 drawn on his account at First Louisville Bank, Louisville, Kentucky, dated April 25, in the amount of $570 payable to Gloria Brown. This check was returned marked "insufficient funds."

III.

In March, 1973, Respondent was hired by Henry Owens, Jr., 305 Virginia Avenue, Louisville, Kentucky 40211, to appeal an adverse ruling by the Bullitt County Court concerning the estate of Owens' mother. Respondent gave the filing fee and appeal papers to Owens and told Owens to file the appeal. Owens then learned that the appeal had been dismissed by the Bullitt Circuit Court on September 28, 1974. Respondent falsely told Owens that the appeal was dismissed because of certain people doing as they wish in Bullitt County, when in fact, it was dismissed because it was untimely filed. Respondent then

informed Owens that the Bullitt Circuit Court ruling could be appealed to the Court of Appeals of Kentucky. Respondent then failed to appeal in the Bullitt Circuit Court until October 29, 1973, and failed to perfect his appeal to the Court of Appeals of Kentucky. On March 12, 1974, the appellee filed a motion to dismiss Respondent's appeal on the grounds that it is untimely, whereupon the Court of Appeals dismissed the appeal on March 21, 1974.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RCA 3.380.

KENTUCKY BAR ASSOCIATION
By: William P. Donan
Chairman,
Inquiry Tribunal

ATTEST:
Leslie G. Whitmer
Director

FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-685

NEVILLE M. TUCKER, *Petitioner*
Vs.
KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

DECEMBER
~~November~~ 1, 1975

PRESS OF KENTUCKY INVESTORS, INC., FRANKFORT, KENTUCKY

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kentucky Court of Appeals (Petition, Appendix 1a-3a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the

petitioner procedural due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Kentucky Court of Appeals.

RULES INVOLVED

Kentucky Court of Appeals Rules concerning procedures in disciplinary cases:

3.160 Initiation of Disciplinary Cases

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(b) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

3.170 Processing Disciplinary Cases

Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge.

3.210 Processing Cases of Default, Pleas of Guilt or Answers Raising Only Issues of Law.

If no answer is filed after a Respondent is notified, or an answer is filed admitting the charge, or the answer raises only issues of law, the Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board. If the answer raises issues of law, the Chairman of the House shall be notified by the Tribunal and he shall appoint counsel for the Association to file a brief within twenty days and the Respondent may file a brief within twenty days thereafter. After briefs are filed, or the time within which briefs may be filed has expired, the record and briefs shall be forwarded to the President for assignment to a member of the Board for a report.

3.230 Procedure When Answer Raises Issues of Fact.

If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman in order that he may appoint an attorney to represent the Association and a Trial Committee composed of three members of the House, one of whom shall be designated Chairman, possess the qualifications of a Circuit Judge and be so commissioned by the Chief Justice. The Director shall immediately notify each member of his appointment and furnish each with a copy of the pleadings.

3.240 Notice of Appointment of Trial Committee and Hearing

(a) Upon the appointment of a Trial Committee, the Director shall notify the parties of the names and addresses of its members. The Chairman of the Trial Committee shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty days after the date of the notice.

(b) The Trial Committee may convene a pretrial conference which shall demand the appearance of counsel representing the respective parties.

3.250 Challenge to Qualifications of Trial Committee

Any time, not later than ten days before the date set for hearing, the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge, the Chairman of the House shall relieve the challenged member and immediately fill the vacancy.

3.300 Rights of Respondent Against Whom A Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel

the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.330 Order of Proceedings and Burden of Proof

The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee, the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings, the burden shall rest upon the applicant. Before submission the Trial committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee, there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 13, 1974, a charge containing three counts was filed against petitioner, Neville M. Tucker, by the Kentucky Bar Association's Inquiry Tribunal. The charge was filed after petitioner had failed to file a response or acknowledge receipt of the complaints certified to him on July 22, 1974, and August 1, 1974, as required by RCA 3.160. After the charge was filed, petitioner failed to file a timely answer as required by RCA 3.200. Pursuant to the provisions of RCA 3.210, the Inquiry Tribunal entered an order of submission on October 10, 1974, submitting the record, together with its investigative evidence, to the Respondent's Board of Governors for disposition.

On November 12, 1974, petitioner attempted to file a late answer to the charge which became a part of the record. On November 13, 1974, the Board of Governors considered the case.

The order of the Board of Governors reflects that petitioner was adjudicated guilty on Counts I and II by the respective votes of 8-4 and 9-2. The order, filed with the Clerk of the Court of Appeals on November 26, 1974, also states that Count III was not considered in

the decision of guilt. The order provides that on a second roll call by a vote of 9-3 it was recommended to the Court that petitioner be given a public reprimand by the Court of Appeals and required to pay the costs of this action.

The first and second counts of the charge pertain to petitioner's representation of Gloria Jean Brown, East Orange, New Jersey, in a personal injury action. The claim of Miss Brown was settled for $42,666.96 after payment of expenses and attorney's fees. On October 5, 1972, petitioner submitted to Miss Brown under a cover letter a check for $42,000 stating that $666.96 was being retained by him "until I can make the proper adjustments for the last plane ticket and a hotel bill which I neglected to include in the settlement as a deduction," with the added statement that, "You shall hear from me again in a few days at which time I shall make the proper adjustments and forward the balance to you." Miss Brown, through her New Jersey lawyer, made repeated demands on petitioner for the delivery of the remaining funds in the amount of $666.96 by some nine written demands between October 31, 1972, through June 13, 1974. In August of 1973, petitioner submitted to Miss Brown a check for $550.00 which was not honored on two occasions because his checking account contained "insufficient funds". This check was never made good. In April of 1974, after four written demands for delivery of said funds, another check in the amount of $570 was sent to Miss Brown by petitioner. The latter check was returned unpaid because of "insufficient funds". On July 19, 1974, Miss Brown's

New Jersey lawyer filed her complaint with the Kentucky Bar Association. On July 29, 1974, petitioner submitted to Miss Brown a certified check in the amount of $570.00.

The order of the Board of Governors (Appendix A, pp. 1a, 2a) was served on petitioner together with the Rule to Show Cause issued by the Kentucky Court of Appeals, the latter being fully set forth in the Appendix of the Petition, pp. 4a-5a.

Petitioner filed a timely Response to the Rule to Show Cause after several extensions of time were permitted by the Court. On May 9, 1975, the full Court sitting, an opinion was rendered disbarring petitioner from the practice of law. The Court's opinion is based solely on Count II of the initial charge. Petitioner's Motion for Oral Argument was denied by the full Court on June 27, 1975. His Motion to Reconsider was denied on June 27, 1975, as was his Petition for Rehearing.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Kentucky Court of Appeals in disciplining an officer of the Court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I
THE DECISION BELOW

WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his Petition for Rehearing before the Kentucky Court of Appeals were whether or not the disciplinary proceedings by the Kentucky Bar Association and the Court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The Court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the Board of Governors were only advisory; and the Court itself made an independent examination of the factual and legal issues involved. The Court itself was the only body which could impose any disciplinary action, and there was no denial of procedural due process. All rules of the Court were strictly followed at all stages of the proceeding.

The Court has clearly stated this position in its opinion below citing ***Kentucky State Bar Association v. Stivers***, Ky., 475 S.W. 2d 900 (1972), cert. denied, 406 U.S. 968, stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final actions to be taken. The role of fact finder

is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904).

* * *

"But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904).

* * *

"In a matter as serious as this, the advisory weight of the Board's action can be little more than nortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904).

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the Board on the issue of guilt on Count II of the charge.

The constitutional issues raised by petitioner were answered by the Court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky Court.

Another issue raised by the petitioner in his brief before the Court of Appeals concerned the recommendations made by the Board of Governors. This issue was clearly defined by the Court upon independent nonfederal grounds. The Court held that the recommendations of the Board were only advisory. RCA 3.370.

The Court in its role as fact finder specifically and unequivocally held:

> "The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. *Kentucky State Bar Association v. Stivers,* Ky., 475 S.W. 2d 900 (1972).
>
> "We are of the opinion that the facts set out in Count II, and admitted by respondent, constitute such dishonesty by the respondent as to warrant permanent disbarment from the practice of law. The fact that these checks were returned for "insufficient funds" can only have one meaning, that is the client's funds were no longer intact. Simply stated, respondent had converted these funds to his own use. We see little difference in the facts here and those in *In re Waxman,* 290 Ky., 277, 160 S.W. 2d 587 (1942), which resulted in the permanent disbarment of an attorney. The fact that restitution was made does not alter the initial dishonesty in misappropriating his client's funds. With respect to the client's funds in the hands of an attorney, he is the trustee of an express trust, and converting these funds to his own

> use is such reprehensible conduct as to make him unworthy of public confidence and unfit to discharge in a proper manner his obligations as an officer of the court."

After firmly placing its opinion on the uncontroverted facts in the record, the Court then drew an inference that respondent converted his client's funds to his own use: the *ONLY* inference that can be drawn from a record devoid of any factual defenses. Petitioner clearly admits the issuance of the two checks and their return because of insufficient funds. The only conclusion to be drawn from the admitted facts is that the trust funds of his client were no longer intact and were converted to petitioner's own use. This inference is reasonably drawn from the evidence and does not deserve the review of this Court.

This case is not unlike the case of ***Kentucky Bar Association v. Judy Ward Smith***, Ky., 492 S.W. 2d 880 (1973), certiorari denied, 414 U.S. 859, where the Court of Appeals, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the transcript formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the Court. This Court denied her Petition for Writ of Certiorari when the Kentucky Court's action was challenged.

The petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the

opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky was based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky and the sound standards of conduct applied to those facts by the Court.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE KENTUCKY COURT OF APPEALS DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 11 of his Petition that ***In re Ruffalo***, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature". The ***Ruffalo*** case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. ***Ruffalo v. Mahoning County Bar Association*** 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar

disciplinary procedures.

The provisions of Rule 3 of the Kentucky Court of Appeals relating to disciplinary proceedings afford full and complete due process protections outlined in the Justice Tom C. Clark Report, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, "Problems and Recommendations in Disciplinary Enforcement" (June, 1970). The federal due process requirements cited in *In re Ruffalo, supra,* while not binding on the states, are a reality in Kentucky disciplinary proceedings.

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually nonexistent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III, Law School, Brigham Young University, Provo, Utah, September 5, 1975.

The constitutional issues raised by petitioner are moot because Rule 3 of the Kentucky Court of Appeals affords a lawyer complete procedural due process of law by any standard. No critical due process question is raised by petitioner. Respondent is aware of no nationwide issue being raised in this case. No evidence is presented of these constitutional issues being raised in any other state proceeding either at the state level or before this Court.

(a) Petitioner was given fair and clear notice as to the reach of the type of discipline to which he might be subject.

At this point it should be noted that petitioner's efforts to join his case with the pending cases before this Court styled *Getty v. Commonwealth of Kentucky ex rel Kentucky Bar Association*, No. 75-125, and *Collis v. Kentucky Bar Association*, No. 75-471, must fail because this action is totally different from the proceeding in these other cases. (Petition, pp. 2-3). Petitioner herein failed to answer the *formal* initial letter of notice of complaint as fully set forth in the Appendix hereto. (pp. 3a-4a). After a charge of unethical and unprofessional conduct was filed, petitioner failed to file a timely answer, thereby, failing to exercise his right to a full due process hearing under RCA 3.230, 3.240, 3.250, 3.300 and 3.330 should the answer have raised issues of fact. The late answer filed on November 12, 1974, when it was due on October 7, 1974, gave the following answer to Count II of the charge:

> "The client was remitted a certified check in

> the sum of $570.00 on July 29, 1974, the said sum representing the amount due her and charges incurred by her in depositing two previous checks which were returned 'for insufficient funds'."

The answer, while untimely filed, is a part of the record before the Kentucky Court of Appeals. Petitioner has admitted the facts on which the Court based its per curiam disbarment proceeding. In both the *Collis* and *Getty* cases, issues of fact were raised and heard in full due process hearings before trial committees before their cases reached the Board of Governors.

Petitioner contends he had no notice of the reach of the disciplinary proceedings and the type of discipline to which he might be subject. This is clearly an erroneous conclusion. The formal letter of notice made it clear the provisions of Rule 3 of the Kentucky Court of Appeals were being followed. Petitioner ignored the notice. The later charge (Petition, Appendix p. 7a) clearly stated:

> "WHEREFORE, complainant charges that such actions by respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to respondent in accordance with RCA 3.380."

RCA 3.380 clearly states the degrees of discipline any respondent is subject to in the Court's discretion.

Respondent ignored the notice in the charge. It is submitted that he ignored the charge because he felt

paying the converted money back would get him off the "hook".

The Board of Governors, on the basis of the record including the complete investigative file of petitioner, ***recommended*** to the Kentucky Court of Appeals a finding of guilt on Count II and ***recommended*** discipline in a degree of a public reprimand by the Court. (Appendix, p. 1a). Petitioner was given clear notice in the order of the Board that it contained only recommendations, and the subsequent Rule to Show Cause stated that petitioner should respond to the degrees of possible discipline from public reprimand to disbarment set forth clearly in RCA 3.380. Petitioner had clear notice of the provisions of RCA 3.370 stating, "any recommendation [by the Board] to the Court that disciplinary action be taken shall be advisory." Petitioner was on notice of the opinion of ***Kentucky State Bar Association v. Stivers, supra***, clearly holding that the Kentucky Court of Appeals was the ultimate fact finder as well as the ultimate determiner of discipline. To say petitioner was "lulled" into a feeling of false security after the Board's recommendation and felt he could receive no more than a public reprimand from the Court is clearly ridiculous without any doubt whatsoever. Petitioner was well aware of the "reach of the grievance procedure".

After disbarment was ordered by the Court, petitioner again had the opportunity to be heard in the form of a Petition for Rehearing. He filed such a petition; however, his only logical argument could be and was he received too much discipline. The facts were admitted. The sound discretion of the Court of Appeals based on prior

Kentucky law as to the discipline warranted could not be reversed on any of petitioner's argument in his Petition for Rehearing.

Respondent argues that his arguments before the Court would have been different had he known he was going to be disbarred. This is a ridiculous argument because he had admitted the facts and the degree of discipline was the only "new" finding of the Court which he did not successfully argue was unfair on Petition for Rehearing.

The *Ruffalo* case has reference to the adequacy of a *charge* before a hearing on the allegations. In this case, petitioner has had more than adequate notice of the charge against him on two occasions prior to the action of the Board of Governors and continuously thereafter so full responses could be made to the charge. The *Ruffalo* test has been met in this case.

The action of the Kentucky Court of Appeals in ordering disbarment should not have surprised petitioner because its conclusion was based on prior Kentucky law in the case of *In re Waxman*, Ky., 160 S.W. 2d 587 (1942). Respondent raised in its brief in the Kentucky Court of Appeals the immorality raised by petitioner's conduct and his breach of integrity and lack of probity under Kentucky law. *Commonwealth v. Roe*, Ky., 112 S.W. 683 (1908). No reply brief was filed by petitioner to answer these arguments. Petitioner had only one argument to make to the Rule to Show Cause and that was why he should not be disciplined, up to disbarment, for his highly unethical conduct.

Respondent agrees with the holding of this Court in

Morgan v. United States, 304 U.S. 1 (1937). It is respectfully submitted that petitioner enjoyed all the safeguards of adequate notice set forth in the *Morgan* decision.

(b) Petitioner was afforded the right to be heard before the Board of Governors of the Kentucky Bar Association and the Kentucky Court of Appeals.

Petitioner's contention that Kentucky disciplinary proceedings are extraordinary in the extent to which they deny due process is totally without merit. It should be noted that petitioner did not raise the issue of the right to be heard before the Board of Governors before the Court of Appeals; therefore, the issue is not properly before this Court. The issue will be answered however.

It is clear petitioner waived any right he had to a full due process hearing on issues of fact and law with the opportunity for calling witnesses, right of cross-examination, the right to testify for himself, including other constitutional safeguards. Respondent filed no timely answer to raise such issues. Even the untimely answer filed raises no issues of fact as to Count II of the charge. The acts alleged in this count were admitted in the answer untimely filed. Had petitioner filed a timely answer which did not raise issues of fact under the rules of the Kentucky Court of Appeals, he could have filed a brief before the Board of Governors as to the degree of discipline warranted under Kentucky law. Petitioner's statement that he had no such opportunity is clearly false. (Petition, p. 17). Petitioner could have been heard before the Board under the facts of this

case; therefore, the proceeding was not *in camera*.

RCA 3.210 clearly provides that where an answer raises issues of law and not issues of fact the respondent herein has twenty days in which to file a brief and petitioner could have twenty days thereafter to file his brief, then the case is submitted to the Board. Petitioner clearly waived his right to this provision when he failed 1) to file a timely answer, and 2) an answer raising the issue of law relating to degree of discipline. Petitioner cannot argue the point now. It is clear this was a "default" case until filed in the Court of Appeals of Kentucky with the order of the Board of Governors.

Obviously, the degree of discipline ordered by the Court of Appeals of Kentucky to the clear fact situation before it is not a federal matter deserving of this Court's review. The state Court had the benefit of petitioner's Response to Rule to Show Cause and a Petition for Rehearing before its mandate issued. It is obvious why a motion for oral argument was denied. No factual defenses were raised. The Court had determined correctly that a lawyer's conversion of a client's funds warrants disbarment; therefore, no benefit could be derived from an oral argument. There was a record before the Court and Board and clear opportunities to be heard on that record.

The Board of Governors under RCA 3.370 serves as a screening device under state law. No federal issue is raised. If, in the opinion of the Board, a case should be dismissed or a private reprimand issued, the case terminates with such action of the Board. If any form of public discipline is considered by the Board it cannot

be ordered effective by the Board. The Board can only recommend to the Kentucky Court of Appeals public discipline in degrees from a public reprimand to disbarment. Final action is by that Court. The Board makes no final decision whatsoever on public discipline. The Court only makes a final determination on the matter after it has received a Response to a Rule to Show Cause and any Petition for Rehearing has been fully considered. Ample opportunity was afforded petitioner to be heard of which he fully availed himself prior to a final determination of his case by the Court. The fact situation of *Southern Railway Company v. Virginia*, 290 U.S. 190 (1933) cited by petition at page 17 of his Petition has no application to this case.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court*

Practice, 3rd Edition (1962).

Petitioner contends that the Court of Appeals of Kentucky failed to give weight to the recommendation of the Board of Governors. The Court concurred with the Board on the issue of guilt on Count II and did not consider Count III as the Board had not. The Board and Court disagreed only on the degree of discipline to be administered.

(c) This case raises no constitutional question on the standard of proof required in bar disciplinary hearings.

Petitioner failed to raise the issue of standard of proof before the Kentucky Court of Appeals; therefore, the issue is not properly before this Court. The issue will be answered, however.

It is true that RCA 3.330 provides that respondent must prove its facts by a preponderance of the evidence. The rule has always been such under the rules of the Kentucky Court of Appeals and the opinions of that Court. The standard of proof is a matter of state policy and does not address itself to this Court as a matter of federal law.

The argument as to standard of proof is moot in this case. The opinion of the state court is based solely on admitted facts in the record. An issue of standard of proof cannot arise from an admitted fact situation. The inference of the Kentucky Court of Appeals that petitioner converted his client's funds is clearly warranted from the record. Respondent could not and did not offer any explanation why his client's funds were not intact. In an effort to get his case remanded by the

Court of Appeals he produced, a bank statement, inadvertently, that conclusively showed a lack of funds in the escrow account to cover the checks he issued to his client. Even without drawing an inference of conversion, it is clear the funds were not intact and only disbarment can afford the public adequate protection.

Petitioner enters into speculation that the required "guilt" vote on Count II by the Board of Governors necessary to refer the case to the Kentucky Court of Appeals may have been different (lower) had a greater standard of proof been required. The writer takes this opportunity to observe that the Board of Governors most probably applies the standard of guilty beyond a reasonable doubt in disciplinary cases regardless of the wording of RCA 3.330.

No Kentucky lawyer is disbarred before the Kentucky Court of Appeals without first having his due process rights fully protected by the rules of that Court. Full constitutional safeguards are given a lawyer.

III
THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the Kentucky Court of Appeals is based soundly on facts in the record before it. The Court considered all defenses, if any, offered by petitioner and clearly stated so. The Court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the Court. The opinion clearly states the

evidence it found in the record to support its findings. The Court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and bar. Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner.

On November 11, 1969, by RCA 3.130, the Kentucky Court of Appeals adopted the American Bar Association Code of Professional Responsibility as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

"DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty. . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank

charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive."

EC 9-5 of the Code states:

"Separation of the funds of a client from those of his lawyer not only serves to protect the client, but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided."

This Court has made clear the strong state interest

of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical Standards of a profession.' *United States v. Oregon State Medical Society,* 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida,* 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); *Cohen v. Hurley,* 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand,* 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on non-existent factual issues before this Court. If the Kentucky Court of Appeals gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1ST day of ~~November~~ DECEMBER, 1975, I served on Honorable Morton Stavis, 744 Broad Street, Newark, New Jersey 07102, Honorable Larry M. Gross, 171 West 33rd Street, Bayonne, New Jersey 07002, and Honorable Robert E. Delahanty, Delahanty & Terry, 701 West Walnut Street, Louisville, Kentucky 40203, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

APPENDIX

APPENDIX A

MEETING
BOARD OF GOVERNORS
EXECUTIVE INN
LOUISVILLE, KENTUCKY
NOVEMBER 13, 1974

The next order of business concerned the charge against Neville M. Tucker, Louisville. This charge was submitted to the Board of Governors by the Inquiry Tribunal pursuant to the provisions of RCA 3.210 because respondent failed to file an answer. An answer was tendered by respondent on November 12, 1974.

On call of the roll, the respondent was adjudged guilty as charged on Counts I and II by votes respectively of 8-4 and 9-2. Count III was not considered in the decision of guilt. Upon a second roll call by a vote of 9-3, it was recommended that the respondent be given a public reprimand.

IN RE: NEVILLE M. TUCKER

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and the matter having been fully considered, the following Findings and Recommendation are made:

FINDINGS:

That the respondent, Neville M. Tucker, be adjudged guilty as charged in Counts I and II.

RECOMMENDATION

It is respectfully recommended to the Court of Appeals of Kentucky that Neville M. Tucker be publically reprimanded for unprofessional conduct and required to pay the costs of this action.

This November 12, 1974

HENRY D. STRATTON
VICE PRESIDENT

LESLIE G. WHITMER
DIRECTOR

APPENDIX B

July 22, 1974

CONFIDENTIAL

Neville M. Tucker, Esq.
235 South Fifth Street
Louisville, Kentucky 40202

Re: Complaint of Gloria Jean Brown
East Orange, New Jersey

Dear Mr. Tucker:

Enclosed herewith is a copy of a letter of complaint filed against you by the above-named complainant. Pursuant to the provisions of RCA 3.160, you have fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordance with RCA 3.170 et sequi.

No contacts or communications shall be undertaken with the Inquiry Tribunal, House of Delegates, Board of Governors, Court of Appeals, or any member thereof. Please observe the provisions of RCA 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response within the stated time to expedite the necessary procedures. If you have any

questions concerning the matter, please contact us.

Sincerely,

Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL

Supreme Court, U. S.
FILED
DEC 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-685

NEVILLE M. TUCKER,
Petitioner,

vs.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITIONER'S REPLY BRIEF

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey 07102,

LARRY M. GROSS,
171 West 33rd Street,
Bayonne, New Jersey 07002,

ROBERT E. DELAHANTY,
DELAHANTY & TERRY,
701 West Walnut Street,
Louisville, Kentucky 40203,
Counsel for Petitioner.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-685

NEVILLE M. TUCKER,
Petitioner,

v.

KENTUCKY BAR ASSOCIATION,
Respondent.

PETITIONER'S REPLY BRIEF

I.
THE POSITION OF RESPONDENT WITH RESPECT TO THE ISSUE OF WHETHER OR NOT PETITIONER WAS GIVEN FAIR NOTICE OF THE TYPE OF DISCIPLINE TO WHICH HE MIGHT BE SUBJECT IS DIRECTLY AT ODDS WITH ITS POSITION IN THE COURT BELOW.

Respondent in its brief in opposition to the Petition for Certiorari (hereinafter "Brief") takes a position directly contrary to the position it took in the court below. This conflict points out with the starkest clarity how petitioner was misled and deprived of fair notice in the court below with

respect to the sanction which the State was seeking to impose upon him: In the court below, the respondent itself viewed the matter exactly as he did.

Respondent now argues that:

> "Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner." (Brief, p. 24)

And it says that:

> "The action of the Kentucky Court of Appeals in ordering disbarment should not have surprised petitioner..." (Id. at 18)

Petitioner submits that "[t]he action of the Kentucky Court of Appeals in ordering disbarment" certainly should have surprised him, as it most certainly did, because it surprised respondent, as well.

In its brief in the Kentucky Court of Appeals, respondent argued that the alleged "immorality raised by petitioner's conduct and his breach of integrity and lack of probity under Kentucky law" were such as to merit a public reprimand. Respondent most certainly did not argue, as it does now in this Court, that "[d]isbarment is the only responsible action the Kentucky Court of Appeals could take." Quite to the contrary, respondent's brief did not even intimate that disbarment might be appropriate.

In response to the Rule to Show Cause with which

he was served, petitioner filed a brief in the court below arguing that the conduct with which he was charged did not merit a public reprimand, as sought by respondent, but that a private reprimand would be sufficient. See Petition, p. 10. Respondent, in its answering brief, argued that the conduct was such as to require a public reprimand.

Petitioner did not argue, as is now suggested by respondent in this Court, "why he should not be disciplined, up to disbarment" (Brief, p. 18), and neither did respondent. 1/

Quite clearly, the argument below was over whether a private reprimand or a public reprimand should be administed to respondent, with neither party so much as touching on the issue of disbarment.

Thus, quite contrary to the position of respondent in this Court, it would seem quite clear that all parties were "surprised" when the court below handed down its opinion permanently disbarring the petitioner from the practice of law. 2/

In view of its position below, it ill behooves respondent to argue in this Court that "the ... Rule to Show Cause stated that petitioner should respond

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1/ Thus, petitioner's failure to file a reply brief below, contrary to what respondent suggests (Brief, p. 18), is of absolutely no significance.

2/ In In re Waxman, 160 S.W. 2d 587 (Ky., 1942), cited by respondent, the attorney was clearly on notice that disbarment was sought.

to the degrees of possible discipline from public reprimand to disbarment..." (Brief, p. 17), when respondent, per its brief below, interpreted the Rule to Show Cause precisely as petitioner did, and an examination of the Rule to Show Cause reveals quite clearly that it did not state what respondent now says that it "stated." See Petition, pp. 4a-5a.

Beyond this, the argument of respondent with respect to the adequacy of the notice in fact given by the Show Cause Rule must fail for the following additional reasons:

1. Respondent, while expounding on the due process merits of the provisions of Rule 3 of the Kentucky Court of Appeals (e.g., Brief, pp. 14-15), completely fails to respond to the argument of the petitioner as to why the language of the Rule to Show Cause issued in this case materially differed from the language specified for such a Show Cause Rule by Rule 3 of the Kentucky Court of Appeals, to wit, RCA 3.410. See Petition, p. 14.

2. RCA 3.380, which respondent characterizes as "clear" (Brief, pp. 16-17) with respect to putting the petitioner on notice that he might be disbarred, is, we submit, anything but clear. See Petition, p. 14. The additional paper served upon petitioner together with the Show Cause Rule (Brief, pp. la-2a), which paper again informed petitioner, as he was informed by the Show Cause Rule itself of the "recommendation by the Board," merely strengthens our argument. 3/

3/ Nor is the confusion mitigated by the provision of RCA 3.370 which states that "any recommendation [by the Board] to the Court that disciplinary

(Footnote continued on next page.)

3. Contrary to what respondent states at p. 21 of its Brief, to wit, that "The Court only makes a final determination on the matter after it has received a Response to a Rule to Show Cause and any Petition for Rehearing has been fully considered," the Rule to Show Cause expressly states that it will be "made absolute" upon "failure to answer." Petition, p. 5a. 4/

Certainly, this means that "upon failure to answer," the finding and recommendation of the Board of Governors would be confirmed 5/--in this case, that petitioner would receive a public reprimand.

(Footnote continued from previous page:)
action be taken shall be advisory," as respondent would not suggest. Brief, p. 17. The provision simply and clearly means that if the Board makes a recommendation to the court that certain disciplinary action be taken, the court may or may not elect to take such action--not that the court could without notice take action beyond that recommended --and it was so construed by respondent in the court below. Respondent's brief below argued 1) that disciplinary action was appropriate to the case; and 2) that the type of discipline to be administered was a public reprimand.

4/ The Show Cause Rule states, in pertinent part, "... and warn him that upon his failure to answer, the rule herein shall be made absolute..."

5/ See, In re Waxman, supra, Ky., 160 S.W. 2d 587, where this is precisely what happened.

And clearly, petitioner had no notice whatsoever that by contesting the propriety of the public reprimand which the Rule to Show Cause told him he would receive if he failed to respond, that he would be subjecting himself to the possibility of disbarment. This was especially so where respondent in its briefs and other papers never once ever intimated that a penalty more severe than a public reprimand might be appropriate--much less that disbarment might be appropriate.

That respondent has been compelled to take a different position in this Court establishes beyond a shadow of a doubt the lack of Constitutionally fair notice in the court below, and the necessity for review by this Court.

II.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER PETITIONER HAD A CONSTITUTIONAL RIGHT TO BE HEARD ORALLY ON THE ISSUE OF DISBARMENT.

Respondent argues that petitioner could have derived "no benefit" from an opportunity to be heard orally in the highest court of Kentucky because that court "had determined correctly that a lawyer's conversion of a client's funds warrants disbarment." Brief, p. 20.

Notwithstanding that, as we pointed out above, respondent itself took a position below contrary to what it now characterizes as "correct," i.e., that disbarment was not warranted, the very argument

now made points out exactly why oral argument was essential in this case: Petitioner had never been charged with "conversion of a client's funds;" no finding of conversion had been made by any administrative fact-finding body, as it had been in In re Waxman, supra, cited by the court below in support of its decision; 6/ and petitioner had never been informed that his conduct "warrant[ed] disbarment." Even though petitioner had admitted the return of the checks for insufficient funds, the Court of Appeals had still to determine, under its broad construction of its powers in this case, a) the inferences to be drawn from the admitted facts; 7/ b) whether the conduct amounted to unprofessional conduct; and c) the discipline, if any, to be

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6/ Petition, p. 3a. Respondent, while first arguing in this Court that conversion is "the ONLY inference that can be drawn" from the fact that the checks were returned for insufficient funds (Brief, p. 12) (emphasis in original), later retreats from this position and argues first that the inference was "clearly warranted" (id. at 22), and then that the drawing of it was not even essential to sustain the extreme penalty of disbarment (id. at 23), as it most certainly was to the court below, as its opinion makes clear. See Petition, p. 3a.

By stating that "[e]ven without drawing an inference of conversion, it is clear the funds were not intact..." (Brief, p. 23), respondent makes clear for all concerned that conversion is not the only inference which can be drawn from the return of checks for insufficient funds.

7/ It was indeed quite clear that though a check

(Footnote continued on next page.)

imposed. Had petitioner been given an opportunnty to appear before the court and argue orally, at least he would have had some notice, by colloquy from the bench, that the court, as opposed to the adversary party, considered the matter tantamount to one of conversion and warranting of disbarment, and some opportunity to respond thereto.

Under their construction of Kentucky law, the Justices of the Kentucky Court of Appeals stood in the same position vis-a-vis petitioner as the judge in Herring v. New York, ___ U.S. ___, 45 L. ed. 2d 593 (1975), stood vis-a-vis the defendant there: They had sole and complete power to determine the facts, the law, and the penalty to be imposed. The petitioner submits that disbarment is so severe a penalty as regards a lawyer's career that due process requires a right to be heard orally before the body with the power to impose it, especially where that body is the State's highest court. While

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(Footnote continued from previous page:)
was returned for insufficient funds on August 23, 1973, the bank statement showed that petitioner's account had been credited with adequate funds on that day to meet the check. The problem apparently was caused by the bank's policy of returning a check in the morning hours even though a deposit was made later in the day and before closing time.

None of these refinements could be presented to the court under the procedure whereby petitioner had no notice of intended disbarment or an opportunity to argue orally the facts and reasonable inferences to be drawn.

Herring does not decide the issue, 8/ "the adversary system's commitment to argument," __ U.S. __, 45 L. ed. 2d at 599, reaffirmed in that case, should likewise be reaffirmed where the litigant is an attorney facing the most severe penalty possible with respect to his career, and where this Court has already held the proceeding at issue to be "quasi-criminal," In re Ruffalo, 390 U.S. 544, 550-51 (1968). Certainly the issue presents a substantial Constitutional question. 9/

8/ __ U.S. at __, n. 13; 45 L.ed. 2d at 601, n. 13.

9/ We agree with respondent that this case is in some respects different from the other two Kentucky disbarment cases now pending before this Court. Brief, p. 15. In those cases, the attorneys had clear notice of the type of discipline to which they might be subject. Thus, this case merits review even more strongly.

Beyond that, petitioner has examined the reply brief in Collis v. Kentucky Bar Association, No. 75-471, and incorporates Points I and II thereof by reference, because the underlying issues discussed there are in major respects the same as in this case. Thus, in Point I of the Collis reply brief, an effective answer is given to the argument of respondent, here as in Collis, that somehow Constitutional issues disappear because the lower court acted "through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky" (respondent's Tucker brief, p. 10; Collis brief, p. 9). Point II of the Collis reply effectively deals with the special impact of the power of the Board of Governors to terminate a proceeding and the lack of oral argument before the court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated:
December 22, 1975.

Respectfully submitted,

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